Aedy bin Osman v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–175 OF 2008
TENGKU BAHARUDIN SHAH, WAN ADNAN MUHAMAD AND AZHAR MA'AH JJCA
10 SEPTEMBER 2009

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether trial judge correct in finding prima facie case of mens rea possession against accused — Whether trial judge invoked presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 to arrive at specific finding of actual possession — Whether trial judge erred in finding that 'Kassim' whom accused alleged was the true trafficker was fictitious person

Acting on information received of a drug trafficking transaction about to take place in the vicinity of 'One Mart 24 Jam' in Johor Bahru ('the Mart'), ASP Abdullah bin Mohammad ('the ASP') and five of his men kept a lookout at the Mart. Soon they noticed a male Malay ('the accused') with a red sling bag on his right shoulder walking in a suspicious manner while making his way to the Mart. The ASP and another member of his team then approached the accused, identified themselves as police and proceeded to apprehend the accused who tried to make an escape. Upon apprehension by the raiding party, the red bag was seized from him for inspection. The bag was found to contain a work pass in his name and two packages of compacted dried material which were confirmed by the chemist to be 1.989g of cannabis, a dangerous drug. The appellant was charged under s 39B of the Dangerous Drugs Act 1952 ('the Act'). In his defence the accused who elected to give evidence on oath named a person by the name of 'Kassim' to be the actual trafficker. Connected to this issue was an assertion by the defence that there was an arrest made at about the same time in connection with the present case which had been suppressed by the ASP. At the close of the trial the High Court convicted the accused of the offence charged and sentenced him to death. This was the accused's appeal against that conviction and sentence. The accused submitted that the trial judge had erred in coming to a finding of actual possession and in drawing an inference of knowledge on the part of the accused when such inference was against the weight of express evidence advanced in the case for the prosecution. The accused also submitted that the trial judge had failed to consider the shortcomings of the case in that no investigations were carried out to determine the existence of Karim. Further, according to the defence the ASP, a prosecution witness, who had suppressed

A evidence in connection with this case was not a credible witness and his evidence ought to have been disregarded by the trial judge.

B **Held,** dismissing the appeal:

(1) According to the facts the appellant was the sole owner of the bag he was seen carrying, which was seized when the accused was apprehended, and its contents. From these facts the trial judge had made a positive finding that there was actual possession of the drugs by the appellant. C The trial judge did not invoke the presumption under s 37(d) of the Act to arrive at a specific finding of actual possession (see para 7).

(2) The trial judge based on the combined effect of all the surrounding circumstances had made a finding of fact that the appellant had mens rea possession. After arriving at this finding the trial judge proceeded to D draw a presumption of trafficking under s 37(da) of the Act whereupon the accused was called to enter his defence. He then analysed the accused's defence and concluded that the accused had failed to rebut the presumption of trafficking raised under s 37(da) of the Act. There was no flaw in what the trial judge had done and as such, there were no E reasons to disagree with the trial judge's conclusion or to interfere with the findings of fact arrived at by him (see paras 11 & 18).

(3) In considering the issue as to whether another true trafficker by the name of 'Kassim' existed, the trial judge guided by the 'Radhi direction' F came to a finding that Kassim was a fictitious person (see para 15).

(4) The trial judge did not accede to the defence proposition that the ASP was not a credible witness and that his testimony should be disregarded and gave his reasons for accepting the ASP's evidence (see para 16).

G **[Bahasa Malaysia summary**

Bertindak berdasarkan maklumat yang diterima mengenai satu transaksi pengedaran dadah yang akan dijalankan di kawasan 'One Mart 24 Jam' di H Johor Bahru ('Mart'), ASP Abdullah bin Mohammad ('ASP') dan lima orang anak buahnya memerhatikan kawasan Mart tersebut. Kemudiannya mereka mendapati seorang lelaki Melayu ('tertuduh') yang membawa beg sandang berwarna merah di bahu kanannya berjalan dalam keadaan mencurigakan ketika menuju ke Mart tersebut. ASP dan seorang lagi anak buahnya I kemudiannya menghampiri tertuduh, mengenalkan diri mereka sebagai polis dan terus memberkas tertuduh yang cuba melarikan diri. Selepas diberkas oleh pihak yang menyerbu, beg merah dirampas daripadanya untuk diperiksa. Beg tersebut didapati mengandungi pas kerja yang tertera namanya dan dua bungkusan padat material kering yang disahkan oleh ahli kimia

sebagai 1.989g kanabis, sejenis dadah berbahaya. Perayu dituduh di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta'). Dalam pembelaannya, tertuduh yang memilih untuk memberikan keterangan bersumpah menamakan seorang individu bernama 'Kassim' sebagai pengedar sebenar. Berhubung isu ini, pihak pembelaan menegaskan bahawa terdapat tangkapan dibuat pada masa yang sama berkenaan kes ini yang disembunyikan oleh ASP tersebut. Pada penutupan perbicaraan, Mahkamah Tinggi menyabitkan tertuduh di atas kesalahan yang dipertuduh dan menjatuhi hukuman mati ke atasnya. Ini merupakan rayuan tertuduh terhadap sabitan dan hukuman tersebut. Tertuduh menghujah bahawa hakim perbicaraan terkhilaf dalam membuat dapatan mengenai milikan sebenar dan membuat inferens pengetahuan bagi pihak tertuduh apabila inferens tersebut bercanggah dengan beban keterangan tersurat yang dikemukakan dalam kes untuk pendakwaan. Tertuduh juga menghujah bahawa hakim perbicaraan gagal untuk mempertimbangkan kelemahan kes tersebut bahawa tiada penyiasatan dibuat untuk memastikan kewujudan Kassim. Selanjutnya, menurut pihak pembelaan, ASP, saksi pihak pendakwaan, yang menolak keterangan berhubung kes ini bukan seorang saksi yang boleh dipercayai dan keterangannya seharusnya ditolak oleh hakim perbicaraan.

Diputuskan, menolak rayuan:

(1) Menurut fakta, perayu merupakan pemilik tunggal beg yang dibawanya, yang dirampas apabila perayu diberkas, dan isi kandungannya. Daripada fakta-fakta tersebut hakim membuat dapatan positif bahawa terdapat milikan sebenar dadah tersebut oleh perayu. Hakim perbicaraan tidak menggunakan anggapan di bawah s 37(d) Akta untuk membuat dapatan spesifik milikan sebenar (lihat perenggan 7).

(2) Hakim perbicaraan membuat dapatan fakta bahawa perayu mempunyai milikan mens rea berdasarkan pengaruh keadaan persekitaran. Selepas membuat dapatan ini, hakim perbicaraan terus membuat anggapan pengedaran di bawah s 37(da) Akta di mana tertuduh dipanggil unuk membela diri. Beliau kemudiannya menganalisa pembelaan tertuduh dan membuat kesimpulan bahawa tertuduh gagal untuk mematahkan anggapan pengedaran yang dikemukakan di bawah s 37(da) Akta. Tidak terdapat kecacatan di dalam apa yang dilakukan oleh hakim perbicaraan dan oleh itu, tiada sebab untuk tidak bersetuju dengan kesimpulan hakim perbicaraan atau campur tangan dalam dapatan fakta yang dibuat oleh beliau (lihat perenggan 11 & 18).

(3) Dalam mempertimbangkan isu sama ada seorang lagi pengedar bernama 'Kassim' wujud, hakim perbicaraan yang dibimbing melalui

'Radhi direction' membuat dapatan bahawa Kassim merupakan individu rekaan (lihat perenggan 15).

(4) Hakim perbicaraan tidak bersetuju dengan kenyataan pihak pembelaan bahawa ASP bukan merupakan saksi yang boleh dipercayai dan bahawa keterangannya seharusnya ditolak dan memberikan alasan-alasannya menerima keterangan tersebut (lihat perenggan 16).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Muhamed Ali [1962] MLJ 257, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B

Appeal from: Criminal Proceeding No MT(3) 45–03 of 2007 (High Court, Johor Bahru)

Gobind Singh Deo (Gobind Singh Deo & Co) for the appellant.
Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] In this appeal, the appellant was charged and convicted under s 39B of the Dangerous Drugs Act 1952 by the High Court, Johor Bahru. He was then sentenced to death. Being dissatisfied with that decision, the appellant now appeals.

[2] The facts as found by the learned trial judge were, at about 12.30 pm on 10 March 2006 while at his office ASP Abdullah bin Mohammad (SP4) received an information that a drug trafficking transaction would take place in the vicinity of *Kedai Serbaneka* 'One Mart 24 Jam', Jalan Padi Emas 4/1, Bandar Baru Uda, Johor Bahru. The suspect was a male Malay. With that information SP4 immediately swung into action. By 3.30pm SP4 and five of his men proceeded to the scene. Upon arrival they positioned themselves at various locations. Soon they noticed a male Malay walking towards *kedai serbaneka* 'One Mart 24 Jam' seen slinging a red bag on his right shoulder

walking in a suspicious manner. SP4 and one of the five members of the raiding party approached the said male Malay, identified themselves as police and immediately apprehended him. A struggle ensued as the man tried to free himself and make an escape. Somehow, SP4 and his men who came to his assistance managed to put the man under control. SP4 then made an inspection on the red bag which carried a brand name 'Converse' and found inside the said bag a newspaper package containing two packages of compacted dried material suspected to be ganja. From the side pocket of the said bag SP4 also found a work pass belonging to the man. Following the recovery of the material the man was taken back to the police station for further investigation. The arrestee was the appellant in this appeal.

[3] The chemist Puan Norashidah bt Omar (SP2) who conducted the test on the two packages of compacted dry material found them to be cannabis with a total net weight of 1,989g.

[4] In coming to the conclusion that appellant was in possession of the said drug, the learned judge in his judgment stated:

> Adalah tidak dapat dipertikaikan bahawa tertuduh sememangnya mempunyai jagaan ke atas beg merah (eksh P15) yang mengandungi dadah berbahaya tersebut (eksh P7 dan eksh P9). Beg merah tersebut (eksh P15) disandang di bahu kanan tertuduh. Oleh itu jelas bahawa beliau mempunyai penguasaan terhadap eksh P15 pada semua waktu yang material.

[5] The learned trial judge in his judgment further added that:

> ... tidak timbul apa-apa keraguan berdasarkan keadaan yang wujud dalam kes ini bahawa tertuduh mempunyai milikan fizikal terhadap dadah berbahaya (eksh P7 dan eksh P9) yang terkandung dalam beg merah (eksh P15) yang disandang di bahu kanannya. Tertuduh mempunyai kuasa untuk berurusan dengannya sebagai seorang pemilik sehingga mengenepikan orang lain dan jika terdapat keadaan yang memerlukan, dia adalah berniat untuk berbuat demikian.

[6] Apparently, learned counsel for the appellant was not happy with the above rationale of the trial judge in coming to the conclusion that there was a positive possession of the drug in question by the appellant. One of the issues raised before us in this appeal is whether the trial judge was correct in finding a prima facie case of mens rea possession against the appellant. It was submitted that the trial judge had fallen into error when he interchangeably used the words 'jagaan', 'penguasaan' and 'milikan' in coming to a finding of actual possession. It was submitted, following the decision of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, a mere custody and control is not sufficient to establish possession for the purpose of the Act.

A [7] With respect, we disagree with learned counsel. What was said by the learned trial judge in the passage of his judgment must be understood in the context of the facts of the case. The appellant was seen carrying the bag in question. Upon apprehension by the raiding party, the beg was seized from him. The offending drugs were found from inside the bag together with a B work pass in his name. It is evident that the appellant was alone at the material time, seen carrying the bag containing the offending item. There was nothing to suggest that the appellant could not have been the sole owner of the bag and its contents. From these facts the issue that arose for determination by us is whether there was evidence of actual possession, and C whether the trial judge had made a positive finding that there was actual possession of the drug by the appellant. We are conscious that the judge cannot invoke the presumption of possession under s 37(d) of the Act. If the trial judge invoked s 37(d) of the Act to establish possession even though there was evidence of actual possession then went on to invoke s 37(da) to D establish trafficking, it would be a serious misdirection. On the facts of the present case and appeal before us it is observed that the learned trial judge in his ground of decision had made specific finding of actual possession of the offending drug by the appellant. Nowhere in the trial judge's ground of E judgment did it show that he was invoking presumption under s 37(d) of the Act to arrive at a specific finding of actual possession.

[8] Coupled with the issue of actual possession was the issue of knowledge. In order to establish possession the prosecution must also establish that the F appellant knew what he was carrying. In this regard, learned counsel for the appellant drew this court's attention to a passage from the trial judge's judgment that reads:

> G Tindakan tertuduh meronta-ronta dan cuba melarikan diri pada pandangan mahkamah, adalah kerana beliau mempunyai pengetahuan mengenai eksh P15 dan kerana ketakutan akibat ditangkap bersama dengan dadah berbahaya. Tertuduh tidak mempunyai sebarang sebab untuk meronta-ronta dan melarikan diri jika beliau tidak menyedari kewujudan atau tidak mengetahui eksh P15 mengandungi dadah berbahaya.

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[9] It was submitted for the appellant that the learned trial judge by drawing an inference of knowledge on the part of the appellant had once again fallen into error as such inference was against the weight of express I evidence advanced in the case for the prosecution. In response to this contention of error committed by the trial judge, the learned DPP for the respondent drew this court's attention to the most recent authority, ie case law on this subject. In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, the Federal Court in its decision, inter alia, had these to say:

(1) Proof of knowledge is very often a matter of inference which varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge...

(2) The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under s 8 of the Evidence Act 1950, since it has direct bearing on the facts in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the appellant himself as required by s 9 of the Act. However, as the appellant did not offer any explanation for his reaction upon being approached by the police, it could be validly used as evidence against him. In the circumstances, the inference to be drawn from the evidence was that he knew what he was carrying.

[10] In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, the Federal Court held that to establish 'possession' under s 37(da) the prosecution must prove that:

> The possessor must be aware of his possession, must know the nature of the things possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea.

[11] From the judgment of the trial judge, it is clear that he held the appellant to have mens rea possession. It is clear from the grounds that such finding was arrived at based on the factual matrix of the case as portrayed by the evidence advanced by the prosecution. Having arrived at this finding, the learned trial judge then proceeded to draw a presumption of trafficking under s 37(da) of the Act, and this called upon the appellant to enter his defence. We find no flaw in this.

[12] In stating his defence the appellant gave his evidence on oath and the trial judge in his grounds of judgment has summarised it as follows:

(8.1) Pada 10 Mac 2006, jam 2.30 petang, tertuduh berada di pejabatnya di Bandar Baru Uda. Menurut tertuduh, beliau bekerja sebagai kerani operasi di syarikat pengangkutan perkapalan. Beliau pergi ke pejabat selepas balik daripada solat Jumaat apabila mendapat panggilan telefon daripada ayahnya, Osman bin Hassan (SD2) yang menyatakan bahawa borang kastam untuk import telah siap. Semasa mendapat panggilan, tertuduh berada di rumahnya di Permas Jaya;

(8.2) Menurut tertuduh, beliau pergi ke pejabat dan rumah dengan menaiki motosikal jenis EX5 No JHX 8573 miliknya. Sesampai di

A pejabat, beliau telah meletakkan motosikal di hadapan pejabat iaitu di Kedai Serbaneka 'One Mart 24 Jam'. Tertuduh kemudiannya masuk ke pejabat pada jam 2.30 petang. Pada masa itu, beliau ada membawa sebuah beg yang berisi dokumen-dokumen kerja dan pas kerja. Apabila masuk ke pejabat, beg, helmet, jaket dan kunci motosikal, B beliau tinggalkan di motosikal yang diletakkan di hadapan Kedai Serbaneka 'One Mart 24 Jam'. Tertuduh naik ke pejabat dan turun semula pada jam 4 petang selepas dokumen-dokumen siap lebih kurang 4 petang.

C (8.3) Apabila turun semula ke bawah, tertuduh telah meletakkan dokumen-dokumen itu di dalam raga motosikal dan kemudiannya pergi berjumpa seorang yang bernama 'Kassim' dan 'Kassim' memberitahunya bahawa bos Pelabuhan Tanjung Pelepas (PTP) tidak boleh datang pada hari itu untuk berjumpa tertuduh;

D (8.4) Menurut tertuduh, beliau mengenali 'Kassim' dalam tempoh dua bulan sebelum hari kejadian. Perjumpaan pada hari kejadian itu berlaku sekejap sahaja iaitu lebih kurang dua minit dan selepas itu, 'Kassim' terus berlalu dari situ. Tertuduh melihat 'Kassim' beredar E dengan menaiki sebuah kereta jenis Kancil di mana nombor pendaftaran kereta tidak dapat diingat tetapi kereta itu berwarna coklat;

(8.5) Menurut tertuduh, beg merah itu berada di dalam raga motosikal dan F beliau meletakkan dokumen-dokumen tersebut di dalam raga. Selepas berbincang dengan 'Kassim', tertuduh mengambil/galas beg dan memakai jaket. Ketika itulah tertuduh dikatakan diserbu dan ditangkap; dan

G (8.6) Tertuduh tidak ingat berapa ramaikah anggota polis yang membuat sebuah. Serbuan dibuat dari arah belakang dan mereka tidak beruniform. Pada masa itu, tertuduh memikirkan bahawa mereka ingin menyamunnya kerana mereka tidak memberitahu identiti mereka. Tertuduh terperanjat. Tertuduh meronta-ronta kerana sakit tertiarap di atas jalan.

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[13] With the above line of defence in the background, it was submitted for the appellant that the trial judge ought to have considered the shortcomings of the investigations on this case in that no investigations were I actually conducted and carried out to determine the existence of 'Kassim', the person alleged to be the actual trafficker in this case. Connected to this issue was an assertion by the defence that there was an arrest made in Kulai at about the same time in connection with the present case. It was submitted for the appellant that information about this arrest was suppressed by the

prosecution's witness SP4. For this reason it was further submitted that SP4 was not a credible witness and his evidence should therefore be disregarded.

[14] The question obviously arose from the above averment ie the existence of 'Kassim' would be whether such person really existed or could it be a mere figment of the appellant's imagination invented for the purpose of the trial. The trial judge in discerning this crucial issue in his judgment had this to say:

> Intipati pembelaan tertuduh ialah beliau telah diperangkap atau dianiaya, bukan oleh polis, tetapi oleh seorang yang bernama 'Kassim'. Walaupun tertuduh tidak secara nyata mendakwa 'Kassim' telah meletakkan eksh P7 dan eksh P9 di dalam beg merah (eksh P15) yang dikatakan ditinggalkan di dalam raga motosikal tetapi secara implikasi tertuduh membayangkan bahawa 'Kassim' mempunyai masa dan peluang untuk berbuat sedemikian.
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> Tertuduh juga menafikan keterangan SP4 yang beliau ditangkap semasa sedang berjalan menuju ke arah depan Kedai Serbaneka 'One Mart 24 Jam' tetapi sebaliknya menyatakan bahawa beliau ditangkap selepas turun dari pejabatnya dan menuju ke tempat di mana motosikalnya diletakkan. Tertuduh menyatakan beliau tidak mengetahui kewujudan dadah berbahaya yang terdapat di dalam beg merah (eksh P15) dan menafikan bahawa beliau ada meronta-ronta dan cuba melarikan diri semasa ditangkap.
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> Berdasarkan pembelaan yang dikemukakan adalah menjadi tugas mahkamah ini untuk menentukan, pertama sama ada 'Kassim' ialah orang sebenar ('a real person') atau hanya rekaan tertuduh semata-mata bagi tujuan pembelaan dan kedua, jika mahkamah memutuskan bahawa 'Kassim' ialah orang sebenar, adakah dia merupakan pengedar yang sebenar. Panduan ini telah diberikan oleh Gopal Sri Ram HMR dalam kes *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773 apabila beliau berkata:
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> > That case (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073 is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker.

[15] Guided by the above, what is called 'Radhi direction' the trial judge apparently came to a finding that 'Kassim' was a fictitious person, and gave his reasons for such finding as follows:

> (20.1) Tertuduh mengatakan apabila dia turun ke bawah dari pejabatnya, beliau meletakkan dokumen-dokumen di dalam raga motosikal. Beg

merah (eksh P15) yang kemudiannya didapati mengandungi dadah berbahaya (eksh P7 dan eksh P9) dan jaket juga telah ditinggalkan di dalam raga motosikal sebelum ini. Kemudiannya dia pergi berjumpa/berbincang dengan 'Kassim' dengan memakai jaket dan menggalas beg tersebut. Pada ketika itulah tertuduh dikatakan diserbu dan ditangkap oleh polis. Versi ini bertentangan dengan versi saksi-saksi pendakwaan. SP4 menyatakan tertuduh ditangkap semasa dia sedang berjalan menuju ke arah hadapan kedai serbaneka 'One Mart 24 Jam' dengan menggalas beg merah tersebut. Perlu diambil perhatian bahawa mengikut SP4, beliau bersama-sama dengan L/Kpl Siti Johara sedang membuat pemerhatian dari kedai bunga berhampiran dengan Kedai Serbaneka 'One Mart 24 Jam' itu. Manakala Kumpulan II pula, yang antara lain dianggotai oleh SP6 (D/Kpl Rajuddin bin Mohamed), berada di dalam kereta berhadapan dengan kedai bunga bersebelahan Kedai Serbaneka 'One Mart 24 Jam' itu. Tumpuan mereka ialah ke arah tempat letak kereta. Sekiranya benar versi tertuduh yang dia turun dari pejabatnya yang terletak di atas Kedai Serbaneka 'One Mart 24 Jam', bagaimana SP4 dan SP6 boleh melihat tertuduh datang dari arah bertentangan dan pergi ke motosikal untuk meletakkan dokumen-dokumen yang dibawanya di dalam raga, mengambil jaket dan beg merah dari dalam raga motosikal dan seterusnya pergi berjumpa/berbincang dengan 'Kassim'. Saksi-saksi pendakwaan mengatakan tidak ada motosikal di tempat kejadian seperti yang dikatakan oleh tertuduh. Jika sebenarnya motosikal itu ada di tempat kejadian, mengapakah motosikal tersebut tidak dirampas oleh anggota-anggota polis yang membuat serbuan seperti yang biasa dilakukan memandangkan ia adalah suatu barang kes yang penting. Borang geledah (search list) iaitu eksh P17 juga tidak menyenaraikan motosikal sebagai salah satu item yang dirampas. Pegawai penyiasat (SP5) dalam keterangannya mengakui bahawa dalam siasatan yang dijalankan, tertuduh ada memberitahunya mengenai sebuah motosikal No Daftar JHX 8573. Walau bagaimanapun, apabila SP5 membuat pertanyaan kepada semua anggota serbuan, mereka tidak tahu menahu mengenainya.

(20.2)..

(20.3) Cerita tertuduh bahawa 'Kassim' adalah pengedar sebenar dan telah menganiaya beliau dengan meletakkan dadah berbahaya di dalam beg (eksh P15) tanpa pengetahuan beliau adalah tidak meyakinkan. Tertuduh mengatakan bahawa tujuan 'Kassim' berada di tempat kejadian adalah semata-mata untuk memaklumkan kepadanya bahawa bos di PTP tidak dapat berjumpa tertuduh pada petang tersebut. Tertuduh mengakui dia ada berhubung dengan 'Kassim' melalui telefon mengenai urusan kerja. Persoalan yang berbangkit ialah mengapakah 'Kassim' tidak memaklumkan perkara itu kepada

tertuduh melalui telefon tanpa perlu pergi berjumpa/berbincang dengan tertuduh. Perjumpaan itu pula berlaku sekejap sahaja, iaitu selama dua minit sahaja; dan

(20.4) Sekiranya 'Kassim' adalah pengedar sebenar iaitu orang yang telah meletakkan dadah berbahaya ke dalam beg merah tertuduh tanpa pengetahuannya, adalah tidak munasabah untuk 'Kassim' menunggu sehingga tertuduh turun dari pejabatnya untuk memberitahu tentang bos di PTP tidak boleh datang, sedangkan 'Kassim' boleh dengan segera menghilangkan diri dari tempat itu selepas meletakkan dadah berbahaya di dalam beg itu. Dengan demikian, 'Kassim' tidak boleh dikaitkan dengan dadah berbahaya tersebut. Keterangan SD2, iaitu bapa tertuduh yang melihat kereta Kancil dan 'Kassim' di tempat kejadian hanya bertujuan menyokong keterangan tertuduh yang didengarinya sebelum itu. Ia juga tidak meyakinkan.

[16] With regard to the event of arrest of another person in Kulai alleged to be connected with the present case and which fact learned counsel alleged to have been suppressed by SP4, the trial judge did not accede to the proposition and request of the defence counsel that the said witness was not a credible witness and his testimony should therefore be disregarded. He gave his reasons as follows:

> Mahkamah telah melihat 'demeanour' beliau semasa memberi keterangan tentang apa yang berlaku pada hari kejadian. Beliau ialah seorang pegawai kanan polis. SP4 tidak mendedahkan tentang tangkapan di Kulai kerana mengikut nota perbicaraan, soalan-soalan berkenaan tangkapan itu tidak dikemukakan kepada beliau pada pemeriksaan awal. Apabila soalan-soalan dikemukakan semasa soal balas oleh peguam terpelajar, SP4 tidak menyembunyikan apa-apa fakta tersebut. Bagi SP4, tangkapan di Kulai itu adalah merupakan satu kes berasingan yang disiasat oleh pegawai penyiasat berlainan .... mahkamah tidak dapat mengesan apa-apa 'evil motive' di pihak SP4 dan keterangannya adalah 'probable' berdasarkan kepada keterangan-keterangan yang dikemukakan dalam kes ini.

[17] The trial judge in coming to the above conclusion derived support from the decision of Thomson CJ in *Public Prosecutor v Muhamed Ali* [1962] MLJ 257. In that case the learned Chief Justice said:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[18] It is thus clear that the trial judge based on combined effect of all the surrounding circumstances had made a finding of facts that the appellant had mens rea possession and that the case came within s 37(da) of the Act, so that the appellant was presumed to be a trafficker of the drug in question. On minute analysis of the appellant's defence the trial judge concluded that the appellant had failed to rebut the presumption raised as aforesaid. We find no reasons to disagree with the aforesaid conclusion.

[19] To keep within the limit of our function as the appellate court we decline to interfere with the findings of facts arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. In short, the appellant was rightly convicted.

[20] For the above reasons we dismiss the appeal and uphold the conviction and also affirm the sentence.

Appeal dismissed.

Reported by Kohila Nesan